No. 14521

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANTHER OIL & GREASE MANUFACTURING COMPANY, a corporation, *Appellant,* vs. JOHN NORMAN SEGERSTROM, as Administrator of the Estate of H. N. Segerstrom, *Appellee.*	NO. 14521

Appellant's Reply Brief

On Appeal from the District Court of the United States, for the Eastern District of Washington

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AUTHORITIES CITED

CASES

TEXTS

STATUTES

ERRATA TO APPELLANT'S BRIEF

p. 3—Third: Reference to "defendant's employees" should be "plaintiff's employees."

p. 14—I: Reference to "plaintiff's Motion" should be "defendant's Motion."

p. 20—last paragraph: Reference to "defendant" should be "plaintiff."

EVIDENCE

Appellant does not question the rule that in determining whether there was evidence of negligence on the part of appellant and whether appellee was contributorily negligent as a matter of law, the evidence must be viewed in the light most favorable to appellee (Br. 2). However, this rule does not give appellee license to disregard undisputed facts or to draw unreasonable inferences from the testimony.

The basic undisputed facts are:

(1) That the plaintiff purchased defendant's roofing compound, both primer and final coat, at one time and in connection with this purchase plaintiff received a pamphlet of instructions which clearly stated "Do not heat or thin Battleship" (Br. 4).

(2) That after plaintiff had stored the roofing compound for more than three months, he directed his employees to apply it to the roof of his warehouse (Br. 6).

(3) That when his employees started to use it, they found it too thick to apply readily (Br. 6).

(4) That plaintiff's foreman called plaintiff and asked if there were any directions or instructions for applying the primer and plaintiff advised him there were no instructions (R. 61, 68, 77; Br. 25). Plaintiff ignores this fact in his statement of the case.

(5) That plaintiff's foreman thereafter rigged up a crude stove and commenced heating the roofing compound in pails set on the stove (R. 70, 71, 72, 78, 88, 89; Br. 7).

(6) That the stove was placed inside a room in the warehouse and after approximately one-half day's operation, the gases and fumes which had collected in the warehouse exploded, setting the warehouse on fire and destroying it (Br. 7, 8).

(7) That plaintiff's workmen would not have heated this product had they been supplied with the instruction pamphlet which was in plaintiff's possession (R. 80, 81).

(8) That plaintiff's foreman knew from the smell that this was a petroleum product (R. 80).

While there are also numerous minor conflicts as to what inferences can be drawn from the record, we do not wish to unduly lengthen this brief by repeating our contentions as set out in our opening brief. However, there is one matter which has been confused in appellee's brief to such an extent that we feel it needs further clarification, and that is the contention of appellee that appellant knew that this material sometimes jelled in the barrel (Br. 12, 21).

Appellee's contention that appellant knew that this material sometimes jelled in the barrel is derived from:

(1) The fact that the material used in plaintiff's experiments was thick and jelled.

(2) Testimony by Ralph Uhrmacher on pages 203 and 232 of the record. The testimony of Mr. Uhrmacher was that any jelling in the barrel was rare and very slight and in his experience the material had never gotten to a condition where you couldn't put it on as it came from the barrel (R. 232). Mr. Uhrmacher's candor in admitting that it is *possible* that the particular material was thick when opened since he could not know all the conditions at the time, including temperature conditions, is a far cry from the implications drawn by appellee.

(3) Testimony of Homer Schauer that this type of product tended to jell when it was thinned or diluted with gasoline and that this material is diluted with what amounts to gasoline. To reach this result appellee has taken statements out of context and twisted their meaning into a wholly unreasonable conclusion. While Mr. Schauer did testify that gasoline could be made out of the solvent used in this material which comes from the second still in the refinery, gasoline is generally made out of the product of the first still (R. 250, 251). The cause of the jelling was given as the presence of the light components in gasoline, like butane or pentanes (R. 254). These light gases are taken off in the first still (R. 250; Br. 19). The solvent for this material comes from the second still.

The only reasonable inference that can be drawn

from this testimony is that gasoline (motor fuel) was added to the sample used by appellee in his tests. Where, when, or how this was added is left to conjecture. The jury, of course, could disregard this evidence or draw any reasonable inference from it but it could not draw an inference that appellant knew that its product tended to jell so that it had to be heated or thinned as claimed by appellee (Br. 14, 21).

ARGUMENT

Appellee's brief is for the most part directed to an issue not involved in this case. Most of his arguments and citations would be more in point had one of the plaintiff's workmen or some third party been injured and been suing for his damages, or had appellee purchased this material from a retailer who had forgotten to pass the instruction pamphlet on to the consumer. *In this case the plaintiff himself received the instruction pamphlet.* The fact that the instructions not to heat Battleship were not pasted on the can, while relevant in an action by one other than this plaintiff, should have no relevancy here.

Whether it should be considered that the plaintiff was grossly negligent in not passing the instruction pamphlet on to his foreman or whether it is assumed in law that the knowledge of the master has been communicated to his servant in a case where the master's rights against a third party are involved, the result is the same. *It is an undisputed fact that had the plaintiff either voluntarily, or in response to*

a request by his foreman, supplied his workmen with the instruction book, the accident would not have happened!

Had this foreman been injured in the fire and had he sued his employer for his injuries, could there be any doubt that the employer would have been held negligent as a matter of law and that the only issue in such case would have been the contributory negligence of the employee? His duty of care toward his property in this case should not be substantially different from his duty toward his employee.

Plaintiff tries to avoid the logical result of these facts by claiming that the plaintiff thought the instructions applied only to the final coat and not to the primer. This contention does not rise to the dignity of evidence. He received one shipment of roofing compound—he received one instruction pamphlet. To split hairs and say he thought it applied only to the final coat and had nothing to do with the first coat and on such a basis tell his foreman simply that there were "no instructions" is too unreasonable to consider. If in fact he knew he had this pamphlet when his foreman called, as his testimony and his contentions in his brief imply, then he was wilfully and wantonly negligent in failing and refusing to advise his foreman that he had this pamphlet and refusing to supply it to him (Br. 25).

Appellee's contention apparently is that when a manufacturer ships products to a man in the orchard

business, who lives in the immediate vicinity of his business establishment, he is no more likely to and has no greater duty to pass these instructions on to his workmen than the President of the United States has to pass on such instructions to some remote activity of the federal government (Br. 23). The comparison is absurd. Appellee was in direct charge of the business and should not be permitted to brush off his responsibility in such a cavalier manner.

Appellee's citations of authority also ignore this basic factual situation. He cites the *Restatement of Torts* § 397, p. 1082 (Comment b) (Br. 18). Comment b, which refers back to § 388, Comment 1, obviously applies to the duty owed by the manufacturer to a third person and contemplates an injury to the rights of such third person. It has no application to this case where the rights and duties between the manufacturer and his immediate vendee only are involved. Please see

Restatement of the Law of Torts, § 388, p. 1049 (Comment 1).

In nearly every case cited by appellee as authority, the material in question was being used in an ordinary and anticipated manner.

Appellee's principal authority appears to be *Standard Oil Co. vs. Lyons* (8th C.A.), 130 Fed. (2d) 965 (Br. 19, 20). In this case the plaintiff had used the material in a normal manner. There was no direct vio-

lation of instructions as in the instant case. The same is true of the cases of *Gennessee County Relief Assn. vs. Sonneborn,* 263 N. Y. 463, 189 N.E. 551, *Thornhill vs. Carpenter-Morton Co.,* 220 Mass. 593, 108 N.E. 474, and *Frazier vs. Ayers* (La. Unpublished App.), 20 So. (2d) 754, (Br. 21, 30).

We will not attempt to analyze each of appellee's authorities except to note that none is at all close to the present case in its factual situation. In only two cases sited had the plaintiff violated instructions and been allowed to recover.

(1) *Fidelity Trust Co. vs. Wisconsin Iron Works,* 145 Wis. 385, 129 N.W. 615, 618. This case was a master and servant case and involved the duty of care owed the servant by his master. The master was running a deadly poison through a hose which usually had water coming out of it and the employer knew that his employees were accustomed to drink out of it. Any normal person would expect very extraordinary measures to be taken under those circumstances to protect the employees. This case in no wise resembles the present problem.

(2) *McClanahan vs. California Spray Co.,* 194 Va. 842, 75 S. E. (2d) 712. This is the only case that seems, at least at first blush, to be similar in any way to the present case. The defendant manufactured and distributed a fungicidal spray for the control of apple scab. The instructions directed that it be used not later than petal fall. The plaintiff used it later than

petal fall and his orchard was severely damaged. The opinion is long and involved. The court held that the plaintiff could recover but to reach that result it analyzed at great length a statute on labeling and reviewed its history and purpose (75 S.E. (2d) at 721, 722). The court points out that the application of the fungicide at a later time was not the proximate cause of the damage (75 S.E. (2d) 722, 723). The court further finds that the plaintiff followed generally-recognized safe practices in the area (75 S.E. (2d) at p. 724). Finally both the court and the concurring Justices point out that *representatives of the defendant were in the orchard while the spray was being applied and they made no objection or protest and gave no indication that the spray was being improperly used!* (75 S.E. (2d) at 725, 726).

Without limiting our contentions as set forth in our opening brief, we respectfully submit that, at the very least, where a manufacturer has sold a product such as this directly to a consumer with instructions not to heat, he has no reason to anticipate that the consumer will heat the material in violation of the instructions, and further that when the consumer does violate the instructions or fails to give the instructions to his workmen working directly under him, such failure is negligence and is a proximate cause of any injury resulting from the failure to pass on these instructions as a matter of law.

In answering appellant's arguments directed to Specifications of Error III and V, appellee opens his

argument (Br. p. 13, 14) with an attack on the adequacy of appellant's objections to the submission to the jury of Sec. 70.74.300 RCW. Appellee returns a second time to this objection at p. 35 of his brief, where he cites in support of his position *Capital Transit Co. vs. Compton,* 187 Fed. (2d) 844, and *W. T. Grant Co. vs. Karren,* 190 Fed. (2d) 710. Neither of these cases lend the slightest support to appellee's position. In the *Compton* case, appellant offered only one criticism to the judge's charge to the jury, on a point not involved in the appeal. In the *Karren* case, no objection was taken to the challenged instruction on the one ground where it was vulnerable to criticism.

In both cases, then, there was a complete failure to make any objection relevant to any fault in the instruction. In our case, on the contrary, it will be observed that all four of our specific objections centered on the obsolete and limited nature of this statute, and the basic objection we then made that roof primer "is not within the statutory definition" opened wide the door to the analysis to which we have subjected the use of this statute by appellee in our brief, which is a mere elaboration of our trial objections.

It will further be borne in mind that this instruction was submitted by the appellee as the principal support of its contention that appellant was negligent. Since appellant submitted these four specific objections to this instruction, there must be some limit to the burden appellee would impose on appellant to protect him from his own misconception of the law.

Passing, now, to appellee's answer to the merits of our argument attacking the submission of this statute to the jury, we are gratified, but not surprised, that appellee is constrained to admit that this criminal statute must be strictly construed, that the rule of *ejusdem generis* must be applied to it, and that the interpretation of this statute is for the court, not for the jury.

On this last point, appellee seeks to excuse the trial judge's submission of the statute to the jury without any interpretation or explanation as to its limited scope or meaning, by saying that the proof showed that roof primer is "more dangerous than straight naphtha and equally as hazardous as gasoline." Appellee further concedes, as he must, that the statutory language, "or other explosive or combustible substance" refers only to substances equally as hazardous as "benzine, gasoline, naphtha, nitroglicerine, dynamite or powder" and of the same general kind.

But these concessions by appellee destroy his argument. The trial court did not give this, or any restricted, meaning to the statute. He did not tell the jury that, before they could apply the statute, they must find that the roof primer is as explosive as gasoline or naphtha, and must be the same general kind or explosive. He did not tell them that this was a criminal statute, to be strictly construed. On the contrary, he left it to the jury to suppose that *any* combustible substance must be labelled. That is just what the statute would seem to mean to the lay mind, unless its lan-

guage was carefully restricted by appropriate definition and limitation. It comes too late for appellee now to concede these limitations. He should have incorporated them in his requested instructions. Thus, by appellee's own concessions, this instruction is gravely misleading and faulty, and should never have been given.

We do not retreat in the least from our position, maintained in our opening brief, that this statute had no application whatever to a widely used commercial product like roof primer. We are here content to demonstrate that appellee's own argument, at the very least, confesses the error of giving this instruction without carefully limiting its effect.

Respectfully submitted,

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